Ernest Cheong Yong Yin (under practice and title Ernest Cheong PTL Chartered Surveyors) v Mohammed Jamal bin Inche I M Salleh & Ors (Messrs Mah-kamariyah & Partners, intervener)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-104–03 OF 012
RAMLY ALI, MOHTARUDIN BAKI AND DAVID WONG JJCA
4 MARCH 2013

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Land Law — Transfer — Property — Sale and purchase agreement to purchase piece of landed property — Execution of Forms 14A and 16A by parties — Purchase price fully-paid — Winding up petition obtained against second respondent company — Whether selling of property void — Disposition of property — Whether applicable — Whether prohibited under s 223 of the Companies Act 1965 — Crucial time in determining applicability of s 223 — Whether purchaser bona fide purchaser

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The first and second respondents had entered into a sale and purchase agreement ('SPA') pertaining to a piece of landed property and to facilitate the transaction, Forms 14A and 16A ('the said Forms') were duly executed by the parties. The said Forms were presented for registration at the Gombak Land Office and consequently, the purchase price of the said property was paid. At the same time, the appellant had obtained a judgment against the second respondent at the High Court and a winding up petition was obtained against the latter. The Citibank solicitors informed the Gombak Land Office that the presentation made was rejected as the subject land in question was within the jurisdiction/administration of the Wilayah Persekutuan Land Office. The second respondent then settled all the overdue assessment and the said Forms were duly and correctly presented at the Wilayah Persekutuan Land Office. The appellant filed a claim at the High Court for, inter alia, an injunction restraining the first respondent to sell the property to a third party; a declaration that the selling of the property by the second respondent to the first respondent was void; and an order that the selling of the property by the second respondent to the first respondent was void; and an order that the Wilayah Persekutuan Land Office nullify the charge from the first respondent to Citibank Bhd. The appellant filed a summons in chambers pursuant to O 14A of the Rules of the High Court 1980 ('RHC') and raised the issues that s 223 of the Companies Act 1965 ('the Act') was not applicable to the disposition of property as the SPA was signed before the commencement of the winding up. The High Court judge dismissed the appellant's application with costs and hence, the present appeal. The appellant submitted that the High Court judge had erred in law and in fact and further submitted that the transfer of the said

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property was caught by prohibition under s 223 of the Act. It was also contended that the date for the disposition of the said property must be taken as the date of the title in the context of transfer of property between the respondents. The first respondent argued that he was a bona fide purchaser and it was only the eventual registration of the transfer into his name that was delayed and the said delay could not, in any circumstances, be said to be his fault. The intervener in the proceedings, solicitors for Citibank, submitted that upon execution of the SPA, the second respondent as the vendor, was no more than a bare trustee and had no legal rights over the property. Therefore it was submitted that the transaction occurred before the presentation of the winding up against the second respondent.

Held, dismissing the appeal with costs:

(1) Once the SPA had been duly executed by the parties and the said forms were executed, the transaction was formalised and subsequently, when the full price for the said property had been paid by the purchaser to the vendor, the transaction was finalised and concluded. After receipt of full purchase price and surrender of possession of the said property to the purchaser, the vendor was clearly a bare trustee for the purchaser of the said property. Effectively, the vendor ('the second respondent') was regarded as having divested itself of all the beneficial interest in the property and vested it in the purchaser ('the first respondent') at the time when Form 14A had been executed and the purchase money was paid in full. The creditors could not then look to its property for satisfaction of any money judgment that might have been obtained (see para 43).

(2) The transaction occurred before the commencement of the winding up petition against the second respondent. The crucial time in determining the applicability of s 223 of the Act was at the point of the transaction. When the purchase price for the sale of the said property was fully-settled and the first respondent, as the purchaser, was given vacant possession. The appellant had never, at any point of time, challenged the genuineness of the sale of the said property. In any event, the transfer had already been registered at the Gombak Land Office on the direction of the Gombak Land Office and the Kuala Lumpur Land Office. The administration issue between the two land offices was irrelevant between the first and second respondents. The only reason why the title of the said property was not registered in the first respondent's name was only for the mere reason that the relevant Form 14A was presented at the wrong land office (see para 44).

(3) The first respondent was a bona fide purchaser for value long before the winding-up petition was commenced against the second respondent. There was no evidence at all to show any element of fraud in the sale transaction. The issue of fraudulent preference did not arise at all. It was

only the eventual registration of the transfer into the first respondent's name that was delayed and the said delay could not, in any circumstances be said to be the fault of the first respondent. The first respondent, as the purchaser, became an equitable owner with equitable rights over the said property (see para 49).

(4) The sale transaction of the property was effectively completed and concluded before the commencement of the winding up petition against the second respondent and therefore, such transaction did not amount to a 'disposition of the property of the company' as stipulated under s 223 of the Act. The transaction did not contravene s 223 and must be held to be valid (see para 51).

[Bahasa Malaysia summary

Responden pertama dan kedua telah menandatangani perjanjian jual beli ('PJB') berkenaan sekeping hartanah dan untuk memudahkan transaksi, Borang 14A dan 16A ('borang-borang tersebut') telah dilaksanakan dengan sewajarnya oleh pihak-pihak. Borang-borang tersebut telah dikemukakan untuk pendaftaran di Pejabat Tanah Gombak dan seterusnya, harga belian harta tersebut telah dibayar. Pada masa yang sama, perayu telah memperolehi penghakiman terhadap responden kedua di Mahkamah Tinggi dan petisyen penggulungan telah diperolehi terhadapnya. Peguam Citibank memberitahu Pejabat Tanah Gombak bahawa penyampaian yang dibuat ditolak kerana subjek tanah yang dipersoalkan ialah dalam bidang kuasa/pentadbiran Pejabat Tanah Wilayah Persekutuan. Responden kedua kemudian telah menyelesaikan semua taksiran tertunggak dan borang-borang tersebut telah dengan sewajarnya dan dengan betul dikemukakan di Wilayah Pejabat Tanah Persekutuan. Perayu memfailkan tuntutan di Mahkamah Tinggi untuk, antara lain, injunksi menghalang responden pertama untuk menjual harta itu kepada pihak ketiga; deklarasi bahawa jualan harta oleh responden kedua kepada responden pertama adalah tidak sah; dan memerintahkan supaya jualan harta oleh responden kedua kepada responden pertama adalah tidak sah; dan satu perintah bahawa Pejabat Tanah Wilayah Persekutuan membatalkan gadaian daripada responden pertama untuk Citibank Bhd. Perayu memfailkan saman dalam kamar menurut A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan menimbulkan isu-isu tersebut bahawa s 223 Akta Syarikat 1965 ('Akta') tidak terpakai kepada pelupusan harta kerana PJB telah ditandatangani sebelum bermulanya penggulungan. Hakim Mahkamah Tinggi telah menolak permohonan perayu dengan kos dan oleh itu, rayuan ini. Perayu berhujah bahawa hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta dan berhujah bahawa pemindahan harta tersebut terangkum dalam larangan di bawah s 223 Akta tersebut. Ia juga menegaskan bahawa tarikh bagi pelupusan harta tersebut hendaklah diambil sebagai tarikh hak milik dalam konteks pemindahan hartanah antara responden-responden. Responden pertama berhujah bahawa dia adalah seorang pembeli bona fide dan hanya

pendaftaran akhirnya pemindahan ke dalam namanya yang ditangguhkan dan kelewatan tersebut tidak boleh, dalam apa-apa keadaan, dikatakan kesalahannya. Pencelah dalam prosiding itu, peguam untuk Citibank, berhujah bahawa setelah perjanjian PJB, responden kedua sebagai penjual, adalah tidak lebih daripada seorang pemegang amanah kosong dan tidak mempunyai hak undang-undang ke atas harta itu. Oleh itu adalah dihujahkan bahawa transaksi itu berlaku sebelum penggulungan dikemukakan terhadap responden kedua.

Diputuskan, menolak rayuan dengan kos:

(1) Apabila PJB tersebut telah disempurnakan dengan sewajarnya oleh pihak-pihak dan borang-borang tersebut telah dilaksanakan, transaksi itu rasmi dan kemudiannya, apabila harga penuh bagi harta tersebut telah dibayar oleh pembeli kepada penjual, transaksi itu telah dimuktamadkan dan diselesaikan. Selepas penerimaan harga penuh belian dan penyerahan pemilikan harta itu berkata kepada pembeli, penjual jelas amanah kosong untuk pembeli harta tersebut. Berkesan, penjual ('responden kedua') dianggap sebagai telah melepaskan dirinya dari semua kepentingan benefisial dalam harta dan meletak haknya kepada pembeli ('responden pertama') pada masa Borang 14A yang telah disempurnakan dan wang belian telah dibayar penuh. Pemiutang-pemiutang tidak dapat lagi menuntut hartanya untuk menyelesaikan apa-apa wang penghakiman yang mungkin telah diperolehi (lihat perenggan 43).

(2) Transaksi itu berlaku sebelum bermulanya petisyen penggulungan terhadap responden kedua. Masa yang penting untuk menentukan pemakaian s 223 Akta tersebut adalah pada masa transaksi tersebut. Apabila harga beli untuk jualan harta tersebut telah diselesaikan sepenuhnya dan responden pertama, sebagai pembeli, telah diberi milikan kosong. Perayu tidak pernah, pada bila-bila masa, mencabar ketulenan jualan harta tersebut. Dalam apa-apa keadaan, pemindahan itu telah pun didaftarkan di Pejabat Tanah Gombak atas arahan Pejabat Tanah Gombak dan Pejabat Tanah Kuala Lumpur. Isu pentadbiran antara kedua-dua pejabat tanah itu tidak relevan antara responden pertama dan responden kedua. Satu-satunya sebab hak milik harta tersebut tidak didaftarkan atas nama responden pertama adalah hanya alasan semata-mata bahawa Borang 14A yang berkaitan telah dikemukakan di pejabat tanah yang salah (lihat perenggan 44).

(3) Responden pertama adalah seorang pembeli bona fide dengan nilai lama sebelum petisyen penggulungan telah dimulakan terhadap responden kedua. Tidak ada bukti yang boleh menunjukkan terdapat sebarang unsur penipuan dalam transaksi jualan. Isu penipuan sebagai pilihan utama tidak timbul sama sekali. Hanya pendaftaran akhirnya untuk

pemindahan ke dalam nama responden pertama yang ditangguhkan dan kelewatan tersebut tidak boleh, dalam apa-apa keadaan dikatakan kesalahan responden pertama. Responden pertama, sebagai pembeli, menjadi pemilik ekuiti terhadap hak-hak ekuiti ke atas hartanah tersebut (lihat perenggan 49).

(4) Transaksi jualan harta itu telah disempurnakan dan selesai sebelum petisyen penggulungan dimulakan terhadap responden kedua dan oleh itu, transaksi tersebut tidak membentuk 'pelupusan harta syarikat itu' seperti yang ditetapkan di bawah s 223 Akta tersebut. Transaksi itu tidak melanggar s 223 dan hendaklah dianggap sah (lihat perenggan 51).]

Cases referred to

Abigail v Lapin [1934] AC 491, PC (folld)
Bato Bagi & Ors v Government of the State of Sarawak [2011] 6 CLJ 387, CA (refd)
Butler v Fairclough (1917) 23 CLR 78, HC (folld)
Daya Bersama Sdn Bhd (in liquidation) v Kiron Chhotalal Doshi and Ors [2010] MLJU 1322; [2011] 2 AMR 40, HC (refd)
Engtex Marketing Sdn Bhd v Zinma Housing Development Sdn Bhd & Anor [2009] MLJU 891; [2009] 5 CLJ 759, HC (folld)
French's (Wine Bar) Ltd, Re [1987] BCLC 499, Ch D (refd)
Gray's Inn Construction Co Ltd, Re [1980] 1 All ER 814, CA (refd)
K Sivapragasam a/l Krishnar v Renominium Development Sdn Bhd & Ors [1998] 4 MLJ 535; [1998] 4 CLJ 481, CA (refd)
Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116; [1971] 1 LNS 43, FC (folld)
Kok Fook Song v Juta Villa (M) Sdn Bhd & 2 Ors [1996] 2 MLJ 666, CA (refd)
Lee Kuet Chin v Garai ak Jelian (Tan Kok Sen, intervenor) [2006] 5 MLJ 342, CA (refd)
Mangamal Jhamatmal Lalwani v NE Vickerama [2001] 1 SLR 90, HC (refd)
Margart Pty Ltd, Hamilton, Re v Westpac Banking Corp and another [1985] BCLC 314, SC (refd)
Ong Ban Chai & Ors v Seah Siang Mong [1998] 3 MLJ 346; [1998] 3 CLJ 637, CA (folld)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (folld)
Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)

Legislation referred to

Companies Act 1965 s 223
Companies Act 1985 [NSW] s 522
National Land Code s 340(2), (2)(b), (c), Forms 14A, 16A
Rules of Court 2012 O 14A r 1, O 14A r 1(2)

Rules of the High Court 1980 O 14A, O 14A r (1)(a), (b)

Appeal from: Civil Suit No S7–21–299 of 2003 (High Court, Kuala Lumpur)

JS Naiker (Venka Aron with him) (Ven & Associates) for the appellant.
Jadadish Chandra (Arbain & Co) for the first respondent.
Nik Syahril Nik Abdul Rahman (Senior Federal Counsel, Attorney General's Chambers) for the second & third respondent.
Jasvinder Kaur (Azim, Tunku Farik & Wong) for the intervener.

Ramly Ali JCA (delivering judgment of the court):

THE APPEAL

[1] This is an appeal by the appellant, who was the plaintiff at the court below, against the whole decision of the learned High Court judge dated 14 February 2012 dismissing with costs the appellant's summon in chambers dated 20 September 2011 (encl 31) and dismissing with costs the appellant's summons and statement of claim dated 2 December 2003, as well.

FACTUAL BACKGROUND

[2] On 27 September 1993, the first respondent (the first defendant) and the second respondent (the second defendant) entered into a sale and purchase agreement ('SPA') pertaining to a piece of landed property owned by the second respondent held under HSM 571, known as Lot 5071, Mukim Ampang, Daerah Kuala Lumpur, Wilayah Persekutuan, together with a house on it at the address No 74, Jalan Keramat Hujong, 54000 Kuala Lumpur. To facilitate the transaction, Form 14A (to effect transfer of the property from the second respondent to the first respondent) and Form 16A (to charge the property to Citibank — the financier) were duly executed by the parties. Stamp duty for the said SPA was duly paid on 25 January 1994.

[3] On 7 February 1994, the Citibank's solicitors attempted to present the said Form 14A and Form 16A at the Pejabat Tanah dan Galian, Wilayah Persekutuan, however, he was informed that the matter was outside the administration of the Pejabat Tanah dan Galian, Wilayah Persekutuan. A letter to that effect was issued by the Pejabat Tanah dan Galian, Wilayah Persekutuan (two letters dated 21 December 1993 and 7 February 1994 were produced to confirm the issue — refer pp 295–296 of the AR). On the same day (7 February 1994) the said Form 14A and Form 16A were presented for registration at the Pejabat Tanah Daerah Gombak. Assessment for the year 1993 and 1994 were paid at the Pejabat Tanah Daerah Gombak.

[4] On the same day also (7 February 1994) the loan sum of RM296,000 was released by Citibank to the second respondent's solicitor, Chin & Co.

[5] On 28 February 1994, the balance of purchase price was released by Citibank to the second respondent. Thus, the purchase price of the said property had been fully paid. On the same day (28 February 1994), the first respondent (as the purchaser) was given vacant possession of the property.

[6] As between 26 March 1997 to 13 August 1997, the Citibank's lawyer was in contact with the first respondent for the purpose of collecting the title from the Gombak Land Office.

[7] In the meantime, on 16 December 1995, the appellant had obtained a judgment against the second respondent at the Kuala Lumpur High Court vide Civil Suit No D5–22–1110 of1992 for a sum of RM239,000 plus interest of 8%pa.

[8] On 23 February 1998, a winding up petition was filed against the second respondent by Aquamech Corporation Sdn Bhd via Kuala Lumpur High Court Civil Suit No D6–28–87 of1998.

[9] On 21 May 1998, the Citibank's solicitors was informed by the Gombak Land Office that the presentation which was made on 7 February 1994, was rejected on the ground that the subject land in question was within the jurisdiction/administration of the Wilayah Persekutuan Land Office (a letter dated 21 May 1998 issued by the Gombak Land Office referred). In the same letter, the solicitors were asked to come to the Gombak Land Office to collect all the relevant documents (Form 14A and Form 16A) presented earlier.

[10] In the meantime, a winding up order against the second respondent was obtained by Aquamech Corporation Sdn Bhd on 10 June 1998, issued by the Kuala Lumpur High Court.

[11] Only on 10 April 2001 the second respondent managed to settle all the overdue assessments (plus penalty) in respect of the said property at the Wilayah Persekutuan Land Office.

[12] On 14 August 2001 the relevant Form 14A and Form 16A were duly and correctly presented at the Wilayah Persekutuan Land Office.

THE APPELLANT'S CLAIM AT THE HIGH COURT

[13] On 2 December 2003 the appellant (the plaintiff) filed his claim at the

Kuala Lumpur High Court vide Civil Suit No S7–21–299 of 2003 (ie the present suit). In his statement of claim, the appellant prayed for the following orders, namely:

(a) satu injunksi untuk menghalang defendan pertama daripada menjual Hartanah tersebut kepada pihak ketiga termasuk dan tidak terhad kepada Maznah binti Ismail (No K/P 630429–10–7828);

(b) satu deklarasi bahawa penjualan Hartanah tersebut daripada Defendan Kedua kepada Defendan Pertama adalah terbatal (void);

(c) satu perintah agar Pejabat Tanah Wilayah Persekutuan Kuala Lumpur membatalkan pindah milik Hartanah tersebut daripada Defendan Kedua kepada Defendan Pertama;

(d) satu deklarasi agar Hartanah tersebut dikembalikan kepada Defendan Ketiga, sebagai liquidasi Defendan Kedua; selaras dengan deklarasi itu, satu perintah agar geran hak milik asal Hartanah tersebut yang dipegang oleh Citibank Berhad ataupun agennya dikembalikan kepada Defendan Ketiga sebagai liquidasi rasmi Defendan Kedua;

(e) satu deklarasi berikutnya (consequential declaration) bahawa gadaian Hartanah tersebut dibatal dan selaras dengan deklarasi tersebut, satu Perintah bahawa gadaian tersebut dibatalkan;

(f) satu perintah agar Pejabat Tanah Wilayah Persekutuan Kuala Lumpur membatalkan gadaian tersebut daripada Defendan Pertama kepada Citibank Berhad;

(g) ganti rugi;

(h) kos; dan

(i) apa-apa relif lain yang difikirkan sesuai dan adil.

THE APPELLANT'S SUMMONS IN CHAMBERS UNDER O 14A

[14] On 20 September 2011, the appellant filed a summons-in-chambers (encl 31) pursuant to O 14A of the Rules of the High Court 1980 (now the Rules of Court 2012). In the said summons-in-chambers the appellant applied for an order that the issues of law in the proceedings be heard and determined under O 14A of the Rules of the High Court 1980 (*persoalan undang-undang dalam prosiding ini didengar dan dilupuskan berdasarkan kepada A 14A Kaedah-Kaedah Mahkamah Tinggi 1980*).

[15] The issues to be determined as stated in the summons-in-chambers are as follows:

(d) Satu-satunya persoalan yang wujud dalam prosiding ini adalah, memandangkan tindakan Penggulungan terhadap Defendan Kedua telah

dimulakan sejak 23 Februari 1998, apakah yang dimaksudkan dengan 'pelupusan hartanah' ('disposition of property') dalam Seksyen 223 Akta Syarikat (1965) menjadi material untuk menentukan sama ada transaksi di antara Defendan Pertama dan Defendan Kedua (Transaksi tersebut) adalah sah atau terbatal tanpa kebenaran/kelulusan Jabatan Insolvensi Malaysia (dahulunya dikenali sebagai 'Pegawai Penerima Harta');

(e) Sekiranya 'pelupusan hartanah' dalam Seksyen 223 Akta Syarikat (1965) bermaksud tarikh Perjanjian Jual Beli tersebut ditandatangani, maka Transaksi tersebut adalah sah; sekiranya 'pelupusan hartanah' yang dimaksudkan merujuk kepada 14 Ogos 2011 di mana presentasi Borang 14A Kanun Tanah Negara dilakukan secara betul dan efektifnya di Pejabat Tanah Kuala Lumpur dan Defendan Kedua telah digulungkan melalui Perintah Penggulungan yang bertarikh 10 Jun 1998, maka Transaksi tersebut menjadi terbatal atas peruntukan Seksyen 223 Akta Syarikat (1965);

(f) Sebagai alternatif, sekiranya 'pelupusan hartanah' yang dimaksudkan merujuk kepada jangkamasa dari 27 September 1992 ke 14 August 2011, iaitu tarikh Perjanjian Jual Beli tersebut ditandatangani dan seterusnya presentasi Borang 14A Kanun Tanah Negara dilakukan di Pejabat Tanah Kuala Lumpur, maka Seksyen 223 Akta Syarikat (1965) adalah dirujuk dan Transaksi tersebut menjadi terbatal kerana pelupusan hartanah tersebut dilakukan dalam jangkamasa selepas Defendan Kedua digulungkan.

[16] In short (in English), the issues forwarded by the appellant, to be determined under O 14A application are as follows:

Given the commencement of the winding-up of the second Respondent on 23 February 1998, does 'disposition of the property' in Section 223 of the Companies Act 1965 mean the SPA dated 27 September 1993 or the transfer took place on 14 August 2001 or the entire period commencing from 27 September 1993 until 14 August 2001:

(a) if it refers to the date of the SPA, then section 223 would not apply to the disposition of properly to the first Respondent by the second Respondent (as the SPA was signed before the commencement of the winding-up by the court);

(b) if it refers to the date of the transfer that took place on 14 August 2001, then s 223 would apply to the disposition of property to the first Respondent by the second Respondent (as the transfer was effected after the commencement of the winding-up by the court); and

(c) if it refers to the entire period that took place from 27 September 1993 to 14 August 2001, then s 223 would apply to the disposition of property (as the period included the period after the commencement of the winding-up by the court).

[17] The learned judge proceeded to hear the appellant's application. In

doing so, she must have been satisfied that the requirements under O 14A r (1)(a) and (b) are fulfilled, ie that such issue/question is suitable for determination without the full trial of the action/claim; and that, such determination will finally determine the entire cause or matter or any claim or issue therein. After giving all parties the opportunity of being heard the learned judge had, on 14 February 2012, dismissed the appellant's application with costs. Consequently the writ of summons as well as the statement of claim was also dismissed with costs.

[18] The appellant, being dissatisfied with the said decision, filed a notice of appeal to the Court of Appeal. Hence the present appeal before us.

AT THE COURT OF APPEAL

The appellant's case

[19] Before this court, the appellant contended that the learned judge had erred in law and in fact when she dismissed the entire action immediately upon dismissing the O 14A application (encl 31).

[20] On merit, the appellant contended that the transfer of the said property from the second respondent to the first respondent was caught by the prohibition under s 223 of the Companies Act 1965. The appellant further submitted that the date for the disposition of the said property of the second respondent (a company — KM Engineering and Development Sdn Bhd) for the purpose of s 223, must be taken as the date of registration of the title in the context of transfer of the property from the second respondent to the first respondent at the Wilayah Persekutuan Land Office on 14 August 2001. The appellant claimed that as the disposition of the said property vide registration at the Wilayah Persekutuan Land Office took effect only after the second respondent was wound up on 10 June 1998, the transfer was void by virtue of s 223 of the Companies Act 1965; and the title obtained by the first respondent from the second respondent shall be defeasible under s 340(2)(b) or (c) of the National Land Code. In his application under O 14A (encl 31) the appellant conceded that if the court finds that the disposition of the property takes effect on the date of the SPA (27 September 1993), then the prohibition under s 223 would not apply as the said SPA was signed and executed before the commencement of the winding up petition on 23 February 1998.

The first respondent's case

[21] The first respondent (the first defendant) submitted that he was a bona fide purchaser for value of the subject property and had paid the full purchase price to the second respondent (the vendor). It was only the eventual

registration of the transfer into his name that was delayed and the said delay can in no circumstances be said to be the fault of the first respondent as a purchaser.

[22] The first respondent claimed that the appellant, as at the date of the SPA and the date of execution of the memorandum of transfer (Form 14A) on 27 September 1993 and the date 7 February 1994 when the documents were presented for registration at the Gombak Land Office had no legal or any interest on the subject property. Even at the date when the appellant obtained a final judgment against the second respondent on 11 December 1995, the first respondent maintained that the appellant had no legal or any interest on the subject property. The appellant also had no caveatable interest over the said property.

[23] The first respondent further submitted that, as at 7 February 1994 the second respondent, as the vendor, became a bare trustee in respect of the said property and the second respondent had divested its interest in the land since then. The first respondent contended that the transfer and disposition of the said property occurred before the commencement of the winding up proceeding against the second respondent and therefore, was not caught under s 223 of the Companies Act 1965.

The intervener's case

[24] The intervener in the present proceeding is Tetuan Mah Kamariyah & Partners, who at the relevant times was the solicitors for Citibank, the financier to the sale and purchase transaction of the said property.

[25] The intervener's case is that the sale and purchase of the said property between the first and the second respondents is not a disposition under s 223 of the Companies Act 1965. The intervener submitted that upon execution of the SPA and execution of Form 14A, which had been properly submitted and presented at the Pejabat Tanah Daerah Gombak, the second respondent as the vendor, was no more than a bare trustee and has no legal right over the property in question, as the transaction occurred before the presentation of the winding-up petition against the second respondent.

[26] Both the first respondent and the intervener prayed that the appellant's application under O 14A ought to be dismissed with costs.

OUR FINDINGS

[27] The appellant's application (encl 31), which is the subject matter of the present appeal before us relates to the application of O 14A r 1 of the Rules of Court, which provides:

> 1 Determination of questions of law or construction (O 14A r1)
>
> (1) the court may upon the application of a party or of its own motion

A determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that —

(a) such question is suitable for determination without the full trial of the action; and

B (b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.

C (3) The court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the court under this Order may be exercised by a Registrar.

D (5) Nothing in this Order shall limit the powers of the court under Order 18, rule 19, or any order provision of these rules.

[28] The requirements under this O 14A r 1 are as follows:

E (a) the question of law or construction must be suitable for determination without the full trial of the action or matter;

(b) such determination will be final as to entire cause or matter or any claim or issue therein; and

F (c) the parties have had an opportunity of being heard on the question.

[29] The test of whether the question of law or construction is 'suitable' to be determined under this order is whether all the necessary and material facts relating to the subject matter of the question have been proved or admitted and G this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action (see: *Mangamal Jhamatmal Lalwani v NE Vickerama* [2001] 1 H SLR 90).

[30] An issue is only suitable for determination under O 14A if the point of law to be determined thereunder have been stated in clear terms and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to I make such determination which would be final as to the entire cause or matter, (see: *Bato Bagi & Ors v Government of the State of Sarawak* [2011] 6 CLJ 387 — Court of Appeal). What is necessary to trigger an O 14A procedure is whether there are sufficient non-disputable facts which are sufficient for the formulation of questions of law which determination will dispose of the whole

suit (see: *Daya Bersama Sdn Bhd (in liquidation) v Kiron Chhotalal Doshi and Ors* [2010] MLJU 1322; [2011] 2 AMR 40).

[31] In the present case, it was the appellant (who was the plaintiff at the court below) who had applied for an O 14A proceeding to determine his claim against the respondents (the defendants). Procedurally, the learned judge allowed the application to determine the issue by way of O 14A procedure but on determination of the issue on merit of the case, the learned judge decided not in favour of the appellant and subsequently dismissed his writ and the statement of claim. We find no flaw in the procedure adopted by the learned judge in dealing with the matter (encl 31) before her. We are also satisfied that all the necessary and material facts relating to the subject matter of the question are not in dispute between the parties. This postulates that there is no dispute or no further dispute as to the relevant facts at the time when the learned judge proceeded to determine the question under O 14A. Clearly, as regards to those relevant facts, there is no necessity to go for full trail for their determination. This is clearly an appropriate case for determination by way of an O 14A procedure.

Substantive issue

[32] Substantively, the question revolves on the issue of whether the sale of the said property in question by the second respondent to the first respondent vide the sales purchase agreement dated 27 September 1993 amounts to a 'disposition' of the property for the purpose of the prohibition under s 223 of the Companies Act 1965. It is not in dispute that a winding up petition against the second respondent was commenced on 28 February 1998 and that the second respondent company was eventually wound up on 10 June 1998.

[33] The appellant's contention is that the disposition of the said property was made only when the relevant Form 14A and Form 16A were presented at the correct Land Office in Wilayah Persekutuan, Kuala Lumpur on 14 August 2001 where both were subsequently registered; and this was only done after the winding up proceeding against the second respondent company had commenced on 23 February 1998 at the Kuala Lumpur High Court vide suit No D6–28–87 of 1998 and the granting of the winding up order on 10 June 1998. The appellant contended that the said disposition was in breach of s 223 of the Companies Act 1965 and therefore must be null and void. That being the case the appellant further contended that the registration of the said property under the first respondent's name violated s 340(2) of the National Land Code and liable to be set aside as the first respondent does not have an indefeasible title to the said property. Thus to the appellant the said property was still owned by the second respondent when it was wound up.

[34] The respondents on the other hand, contended that all the crucial and material transactions and facts occurred before the commencement of the winding up petition against the second respondent on 23 February 1998. The sale and purchase agreement was executed by the parties on 27 September 1993; Form 14A and Form 16A were duly executed by the parties on the same date; full purchase price was duly paid by the first respondent to the second respondent on 7 February 1994; the said Form 14A and Form 16A were presented at the Gombak Land Office for registration on 7 February 1994 and were in fact, duly acknowledged with *Jilid*, Folio and Presentation number given by the said land office; and the purchaser (the first respondent) had obtained full vacant possession of the said property on 28 February 1994. All these events clearly accrued before the commencement of the winding up petition against the second respondent.

[35] That being the case, the respondents contended further that, based on the principle of 'bare trustee', it cannot be denied that the second respondent (as the vendor) had divested its interest in the said property as of 7 February 1994 and therefore the disposition of the said property by the second respondent was made before the commencement the second respondent on 23 February 1998; and therefore was not in breach of s 223 of the Companies Act 1965.

[36] Section 223 of the Companies Act 1965 provides:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void.

[37] The learned judge found that the second respondent, based on the facts and circumstances of the case, was a mere 'bare trustee' and has no more interest in the said property when the full purchase price was paid on 7 February 1994 and subsequently the first respondent, as the purchaser, was given full vacant possession of the said property on 28 February 1994, ie.before the date of the commencement of the winding up petition against the second respondent on 23 February 1998. Clearly, the learned judge was of the view that 'disposition' of the said property took place before the commencement of the winding up petition, but not when the relevant Form 14A and Form 16A were re-registered at the Land Office Kuala Lumpur on 14 August 2001.

[38] We are of the view that once a winding up petition is commenced (ie when it is filed in the High Court) the second respondent as a company in question is not free without order of the court to dispose of its property in whatever form and by whatever means. This is to prevent the improper

alienation and dissipation of the company's asset before the winding up petition is heard and determined, (see: *Walter CM Woon's Company Law*, (3rd Reprint), 1992 at p 494; and *Kok Fook Song v Juta Villa (M) Sdn Bhd & 2 Ors* [1996] 2 MLJ 666).

[39] In *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814, the English Court of Appeal ruled:

> It is the basic concept of our law governing liquidation of insolvent estates, whether in bankruptcy or under the Companies Act, that the free assets of the insolvent at the commencement of the liquidation shall be distributed rate ably amongst the insolvent's unsecured creditors as at that date.

[40] The phrase *any disposition of the property of the company* was also dealt with by the Chief Justice of the Equity Division of the Supreme Court of New South Wales in *Re Margart Pty Ltd, Hamilton v Westpac Banking Corp nad another* [1985] BCLC 314, in dealing with the equivalent provisions of s 522 of the New South Wales Law. The relevant passage in that case reads as follows:

> I take the view that the phrase 'any disposition of the property of the company' in the context of s 368 relates to something done with property that the company is free to deal with. I do not think there is a disposal of property of the company when there is a dealing by someone who is really someone other than the company who has the right to say how it is to be dealt with, and whatever interest the company has in that properly gives it no control of management over the property nor powers to interfere.

[41] Another authority on this point can be found in the decision of Virelott J in *Re French's (Wine Bar) Ltd* [1987] BCLC 499, where His Lordship ruled that: *where, before the presentation of a winding-up petition, a company has entered into an unconditional contract for the sale of property which was specifically enforceable, then the completion of the contract according to its terms after the petition has been presented would not constitute a disposition within the meaning of s 522 (equivalent to our* s 223 of the Companies Act 1965). The learned judge (in that case) clearly had in mind assets or properties to which the company is beneficially entitled and which are capable of being realised for the benefit of its creditors.

[42] It is settled law that in determining whether s 223 of the Companies Act 1965 applies, the time of disposition is obviously crucial. As laid down by the Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 CLJ 793, and followed unequivocally by the Court of Appeal in *Ong Ban Chai & Ors v Seah Siang Mong* [1998] 3 MLJ 346; [1998] 3 CLJ 637 and *Engtex Marketing Sdn Bhd v Zinma Housing*

Development Sdn Bhd & Anor [2009] MLJU 891; [2009] 5 CLJ 759, the material time for the disposition is the time of the transaction.

[43] Based on the above authorities, we are of the view that once the sales and purchase agreement had been duly executed by the parties (the first and the second respondents) and Form 14A and Form 16A were executed, the transaction was formalised; and subsequently, when the full price for the said property had been paid by the purchaser (the first respondent) to the vendor (the second respondent) the transaction was finalised and concluded. All these transactions occurred long before the presentation or commencement of the winding up petition against the second respondent. (See: Court of Appeal decision in *K Sivapragasam a/l Krishnar v Renominium Development Sdn Bhd & Ors* [1998] 4 MLJ 535; [1998] 4 CLJ 481). Once the vendor, after receipt of full purchase price and surrender of possession of the said property to the purchaser, the vendor was clearly a bare trustee for the purchaser of the said property. Effectively the vendor (the second respondent) is regarded as having divested itself of all the beneficial interest in the property and vested it in the purchaser (the first respondent) at the time when the memorandum of transfer (Form 14A) is executed and the purchase money is paid in full; and once there has been a divesting of beneficial ownership and interest by the registered owner (the second respondent) its creditors cannot look to its property for satisfaction of any money judgment that may have been obtained. These are clear principles adopted by the Federal Court in *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45; *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116; [1971] 1 LNS 43; and by the Court of Appeal in *Lee Kuet Chin v Garai ak Jelian (Tan Kok Sen, intervenor)* [2006] 5 MLJ 342.

[44] In the present case, the facts clearly show that upon the execution of the sales and purchase agreement and the transfer form (Form 14A), as well as Form 16A, the second respondent was no more than a bare trustee and has no legal right over the said property. The transaction occurred before the commencement of the winding up petition against the second respondent. The crucial time in determining the applicability of s 223 of the Companies Act 1965 is at the point of the transaction ie at the point of the sale and purchase agreement and at the time of the execution of the transfer form (Form 14A). The position is made clearer when the purchase price for the sale of the said property was fully settled and the first respondent as the purchaser was given vacant possession. It must be noted that the appellant has never at any point of time challenged the genuineness of the sale of the said property between the first and the second respondents. In any event, the transfer had already been registered at the Gombak Land Office on the direction of the Gombak Land Office and the Kuala Lumpur Land Office. The administration issue between the two land offices is irrelevant between the first and the second respondents.

The only reason why the title of the said property was not registered in the first respondent's name as of 7 February 1994 was only for the mere reason that the relevant Form 14A was presented at the wrong land office.

[45] Our view is that the reason for the said rejection does not make nor effect the duly executed Form 14A as null and void nor makes its non-registrable and there is no need or requirement for afresh Form 14A to be re-executed thereafter. Thus, the duly executed Form 14A by the directors of the second respondent on 27 September 1993 remains valid and registrable transfer and there is no evidence adduced by the appellant to suggest otherwise and that this execution of transfer did not take place after the second respondent was wound up as alleged by the appellant. Hence, there is no need for any sanction to be obtained from any party nor can it be said that the said Form 14A is void.

[46] All the relevant documents for registration of the transfer and the charge were duly sent for registration, albeit at the wrong land office ie the Gombak Land Office. Valid presentation and *jilid* number as well as folio number had been given by the said land office. The first respondent had done all that he was obliged to do pursuant to the terms and conditions of the sale and purchase agreement dated 27 September 1993. Assessment for the years 1993 and 1994 was duly paid at the Gombak Land Office. It was only on 21 May 1998 that the Gombak Land Office issued a letter to the solicitors of the first respondent's financier (ie more than four years after the presentation of the documents for registration) to say that 'surat cara pindahmilik dan gadaian yang diserahkan untuk pendaftaran adalah di TOLAK. Ini adalah disebabkan kawasan berkenaan adalah di dalam Pentadbiran Wilayah Persekutuan'. The said solicitors were asked to take back all the documents from the Gombak Land Office. The said letter was issued upon query made by the financier (the intervener) on the matter.

[47] It must also be noted that before those documents were presented to the Gombak Land Office on 7 February 1994, the solicitors had attempted to present them at the Kuala Lumpur Land Office, on the same date. However, they were informed that the said property was not within the administration of the Kuala Lumpur Land Office. This was clearly stated in a letter dated 7 February 1994 issued by Pentadbir Tanah, Wilayah Persekutuan Kuala Lumpur to Pentadbir Tanah Gombak. The solicitors then immediately (on the same day) presented all those relevant documents at the Gombak Land Office for registration.

[48] The second respondent, as the vendor having parted with its interest in the said property to the first respondent was a bare trustee and had no interest in the property. The Federal Court in *Temenggong Securities Ltd & Anor v*

Registrar of Titles, Johore & Ors had made this position clear. The relevant passage in that case is reproduced below:

> On 22 September 1972 the first appellants and their nominees, the second appellants, paid the full purchase price to the vendors which executed due transfers of the lands in favour of the second appellants, the nominees of the first appellants, and gave delivery of the issue documents of title and two discharges of charge to their solicitors. On the same date, possession of the said land was given to the second appellants. On 14 December 1972 the memorandum of transfer and the titles and discharges were presented for registration, after adjudication for stamp duty purposes, (being registration No 8401/72 in File of Transfer Vol 534 Fol 52).
>
> Have the vendors any further rights in the lands in respect of which the caveat has been lodged which can prevail over the rights of the purchasers who have paid the full consideration therefor and obtained possession thereof prior to the lodgment of the caveat? In our view there can be no doubt as to the position in law. As was said by Jesse/MR in *Lysaght v Edwards* [1876] 2 Ch D 499 at p 506:
>
> ... the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.
>
> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day, that the vendors have no interest in the lands which can be the subject matter of a caveat.
>
> The validity of the contract between the appellants and the vendors has not been seriously challenged nor, in our view, can it be.
>
> We are of the view that the vendors, having parted with their interest in the lands to the appellants, are bare trustees and have no interest in the land over which a valid caveat can be lodged. Respondent's counsel tried to make mush of cl 1 of the agreement of 30 August 1972 that 'the vendor shall sell and the purchaser shall purchase' and that therefore no rights passed as the agreement was non-registrable and a non-statutory instrument capable of passing title to the appellant. He glossed over the fact that the vendors had done everything that was required of them to transfer the title and had thereby constituted themselves bare trustees for the appellants and had no other or further interest in the lands.

[49] The first respondent is a bona fide purchaser for value long before the winding up petition was commenced against the second respondent. There is no evidence at all to show any element of fraud in the sale transaction. The issue of fraudulent preference does not arise at all. It was only the eventual

registration of the transfer into the first respondent's name that was delayed and the said delay can in no circumstances be said to be the fault of the first respondent. The same issue was dealt with and determined by the Federal Court in *Karruppiah Chettiar v Subramaniam* [1971] 2 MLJ 116, where Ong CJ (Malaya) held: 'in the instant case Mohamed Sharjudin having sold his entire interest in the land and received payment in full undoubtedly holds the legal estate only as a bare trustee for Subramaniam, who is the equitable owner. Want of registration cannot affect his equitable rights'.

[50] In the circumstances of the present case, the first respondent as the purchaser became an equitable owner with equitable rights over the said property. Such equitable rights are recognised under the Torrens System of registration of title to landed property. This was made clear by Gill FJ in the Federal Court case of *Karruppiah Chettiar* where His Lordship ruled as follows:

> Now, the transaction in the present case was a contract of sale and purchase in relation to the interest in the land in question, followed by the execution of a memorandum of transfer which complied with the relevant requirements of the National Land Code. There has been no suggestion that there was anything fraudulent about the sale. The effect of that transaction was to give the respondent an equitable estate in or at least an equitable right to the land. That such equitable estates and rights are recognised under the Torrens System of registration of titles to land is not open to question. As Taylor J said in the course of his judgment in the Court of Appeal in *Wilkins & Others v Kannammal & Anor*, with which judgment Foster Sutton CJ and Wilson J concurred, 'the Torrens law is a system of conveyancing; it does not abrogate the principles of equity.'

If further authority is required for that proposition, it is to be found in *Butler v Fairclough* (1917) 23 CLR 78, 91; and *Abigail v Lapin* [1934] AC 491(Privy Council).

[51] Based on the above authorities, we are fully satisfied that the sale transaction of the property in question from the second respondent (as vendor) to the first respondent (as purchaser) was effectively completed and concluded before the commencement of the winding up petition against the second respondent (ie when the sale and purchase agreement and the respective Forms 14A and 16A were executed on 27 September 1993, full purchase price paid on 7 February 1994 and vacant possession handed to the purchaser on 28 February 1994). Therefore such transaction does not amount to a 'disposition of the property of the company' as stipulated under s 223 of the Companies Act 1965. The transaction does not contravene s 223; and therefore must be held to be valid. That being the case the issue of obtaining a validation order from the court as contended by the appellant does not arise. We must stress it here that a validation order for the disposition is only applicable and required when the said disposition or sale was carried out after the commencement of the winding up petition and void in contravention of

s 223 of the Companies Act 1965, but not in the present case. Therefore the appellant's argument that the sale of the property was invalid for failure to obtain a validation order from the court holds no water.

[52] The second respondent has no more interest in the said property when the winding up order was granted against it on 10 June 1998 by the Kuala Lumpur High Court. It had divested its beneficial ownership in favour of the first respondent as the purchaser. The second respondent held the property as a bare trustee for the benefit of the first respondent who had obtained equitable rights over it. This is in line with the decision of Ong CJ (Malaya) in *Karruppiah Chettiar v Subramaniam* that 'once there has been a divesting of beneficial ownership by a registered proprietor his creditor cannot look to his land for satisfaction of any money judgment that may have been obtained.'

[53] Similarly in the present case applying the same principle, the appellant who had obtained money judgment for a sum of RM239,000 plus interest against the second respondent vide Kuala Lumpur High Court, Civil Suit No D5–22–1110 of 1992, on 11 December 1995, cannot look to the said property in question for satisfaction of the said money judgment. The said property was not vested in the hand of the liquidator upon granting of the winding up order against the second respondent. It does not form as part of the estate of wound-up company and therefore would not be subjected to the liquidation process. The appellant cannot obtain any form of interest including covetable interest, on the said property.

[54] On this issue, we are in full agreement with the learned judge in her findings that the second respondent was a mere bare trustee as at 28 February 1994 and the disposal or sale of the said property occurred long before the commencement of the winding up petition against the second respondent; and therefore it does not amount to a disposition as stipulated under s 223 of the Companies Act 1965.

[55] The learned judge was correct in dismissing the appellant's application vide encl 31 under O 14A of the Rules of Court 2012. The learned judge was also correct in dismissing the appellant's writ and statement of claim immediately after dismissing encl 31. Order 14A r 1(2) of the Rules of Court 2012 empowers the court, upon making its determination of the question posed by the appellant in his application vide encl 31, to dismiss the action or matter or make such order or judgment as it thinks just. The action or claim would he finally disposed of without the full trial and the decision or order will have the same force and effect as the judgment or order after a full trial (see also: *Malaysian Court Practice — 2007 Desk Edition*, High Court, p 143, para 14A, 2.4).

[56] The strength of the appellant's statement of claim lies on the determination of the issue posed by him in his application for an O 14A procedure vide encl 31. If the determination is not in his favour, then his whole claim as found in his statement of claim must also fall. We are in agreement with the learned judge in dismissing the appellant's statement of claim upon her determination of the question posed, not in favour of the appellant. We find no reason to interfere.

CONCLUSION

[57] Based on the above considerations, as well as the authorities cited, we affirm the decision of the learned judge. We therefore dismiss the appeal with costs of RM5,000 to each of the respondents and the intervener. We also make an order that the deposit be refunded to the appellant.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor